consent; but an undertaking given by mistake in too wide terms will not be enforced insofar as it was mistakenly given.

The undertaking must be clear in its terms. The whole of the agreement to which it relates must be before the court, and the undertaking must be one which is not impossible *ab initio* for the solicitor to perform. Nevertheless, an undertaking will be enforced against the solicitor even though, after it is given, the client dies or instructs the solicitor not to perform it, or changes his solicitor. If performance of the undertaking has been waived the undertaking will not be enforced afterwards. Similarly, if the undertaking is conditional, the condition must be fulfilled before the undertaking will be enforced."

The Court agreed with the submission of counsel for the plaintiffs that defendant's case is somewhat similar to the case of *T. Damodaran* v. *Choe Kuan Him* (*supra*) where the solicitor said he would pay over the purchase money to the vendor on a certain happening which took place. In defendant's case he gave an undertaking to have the Kuala Lumpur lands charged on the plaintiffs paying the $600,000.00 asked for and the plaintiffs performed their part of the bargain. In *T. Damodaran* v. *Choe Kuan Him*[1] Lord Diplock said:-

"The terms of the solicitor's undertaking are clear, unqualified and unequivocal. The event on the happening of which the money was to be paid took place on April 16, 1974, when the transfer of the lands was 'duly registered in the name of the purchaser Messrs. Syarikat Alor Merah Sdn. Bhd.' The failure to pay the balance of $182,200.00 is, on the face of it, a plain breach of the undertaking. There would seem to be no reason why in the instant proceedings, commenced on July 30, 1974, by Originating Summons against the solicitor to enforce the undertaking, the vendor should not recover judgment for the balance of $182,200.00 with interest from April 16, 1974."

As regards the defendant's alleged defence that he used his own discretion to protect the interests of both his clients, the Court also agreed with the submission of the plaintiffs' counsel that in doing so he is not relieved from his undertaking. True to say in his doing so he went into deeper waters and breached his undertaking to the plaintiffs which resulted in the Kuala Lumpur lands not being charged to the plaintiffs, the net result of which was that he was even instrumental to the borrower breaching his loan agreement ('ID-1'), Enclosure (11), containing definite schedule of payments – drawdowns – and it was not disputed that $3.8 million had already been paid out to the borrower without the security documentation having been completed. As to the temporary stoppage, if it can be termed such, it was of no consequence as the defendant was never relieved of his undertaking and according to the schedule of payments in 'ID-1' the last payment of $1.4 million would only be released by the plaintiffs on production of an architect's certificate which was only being sent on October 21, 1982 ('ARR-4') and the temporary stoppage and also the notice was in fact withdrawn ('ARR-10') and the defendant was requested to honour the undertaking given.

The position in which the defendant found himself in is well set out in *Ong Kim Khoon* v. *Gaya Filem Bhd.*[3] where Raja Azlan Shah F.J. said at page 81:

"It is impossible for the same person to give satisfactory service as the confidential and expert adviser of two parties with conflicting interests. The man who undertakes to serve two masters may easily find himself in a position where he must be false to one and possibly to both."

Indeed it was when the defendant tried to act for both masters that he found himself in this predicament, a fault brought by him upon himself as Scrutton L.J. said so and did so warn in *Moody* v. *Cox and Hatt*[4]:

"It will be his fault for mixing himself up with a transaction in which he has two entirely inconsistent interests ..."

The Court was satisfied on the balance of probabilities that the defendant breached the undertaking he gave to the plaintiffs in his professional capacity and it applied the case of *T. Damodaran* v. *Choe Kuan Him* (*supra*) which the Court is bound to follow and it then gave an order in terms as prayed by plaintiffs in their Originating Summons dated November 23, 1984 and costs.

The defendant appeals.

Claim allowed.

Solicitors: *Joseph Lee & Co.; Rayner & Co.*

PUBLIC PROSECUTOR v. PARAM CUMARASWAMY

[O.C.J. (Chan J.) January 3, 1986]

[Kuala Lumpur – Federal Territory Criminal Trial No. 39 of 1985]

Criminal Law and Procedure – Charge of sedition – Close of prosecution case – Whether prima facie case made out – Sedition Act, 1948, ss. 3(1) & 4(1) – Criminal Procedure Code (F.M.S. Cap. 6), s. 180 – Federal Constitution, art. 10.

In this case the respondent was charged with uttering seditious words, an offence under the Sedition Act, 1948. At the close of the prosecution case, counsel submitted that there was no case to answer.

Held: (1) all that is required at the close of the prosecution case is for the prosecution to discharge their evidential burden by adducing sufficient evidence to raise a *prima facie* case against the accused. At that stage, a trial judge should not consider whether or not a case has been proved beyond a reasonable doubt against the accused. If no evidence is called for the defence, then, and then only, the tribunal of fact must decide whether the prosecution has succeeded in discharging the persuasive burden by proving its case beyond a reasonable doubt;

(2) in this case the prosecution has discharged their evidential burden by adducing evidence of primary facts. The accused must therefore be called to enter on his defence.

Cases referred to:

(1) *Haw Tua Tau* v. *Public Prosecutor* [1981] 2 M.L.J. 49.
(2) *Reg.* v. *Burns & Ors.* (1886) 16 Cox C.C. 355.
(3) *Wallace-Johnson* v. *King* [1940] A.C. 231, 240.
(4) *Reg.* v. *Sullivan* (1868) 11 Cox C.C. 44, 52-53, 58-59.
(5) *Reg.* v. *Burdett* (1820) 4 B. & Ald. 95, 131, 137-8; 106 E.R. 873.
(6) *Rex* v. *Aldred* (1909) 22 Cox C.C. 1, 3.
(7) *Emperor* v. *Sadashiv* A.I.R. 1947 P.C. 82, 84.
(8) *Melan* v. *Public Prosecutor* [1971] 2 M.L.J. 280, 282.
(9) *Assa Singh* v. *Mentri Besar, Johore* [1969] 2 M.L.J. 30.

CRIMINAL TRIAL.

Mohamed Noor bin Hj Ahmad and *Ng Aik Guan* for the Public Prosecutor.

Raja Abdul Aziz Addruse, C.V Das, P. Royan, Manjeet Singh Dhillon and *Darryl Goon* for the defendant.

S. Theivanthiran for the Malayan Bar (watching brief).

R.R. Chelliah for the International Bar Association (watching brief).

Datuk Peter Mooney for the Bar Council of England and Wales (watching brief).

G.T.S. Sidhu for LAWASIA (watching brief).

Dato Wong Seng Chow for the *New Straits Times* (watching brief).

David Malcolm Q.C. for LAWASIA (*observer*).

Ooi Boon Leong for the International Commission of Jurists (observer).

Cur. Adv. Vult.

Chan J.: The charge against Mr. Param Cumaraswamy is:

"That you on July 24, 1985 at about 11.00 a.m. at the office of the Selangor and Federal Territory Bar Committee in the old High Court Building, in the Federal Territory of Kuala Lumpur, uttered seditious words to wit, that part of your press statement as underlined, (the full text of which is attached as Schedule 'A' to this charge) and that you have thereby committed an offence under section 4(1) (b) of the Sedition Act, 1948 (Revised 1969) and punishable under Section 4(1) of the said Act."

At the close of the prosecution's case, counsel for the defence submitted that there is no case to answer.

All that is required at the close of the prosecution's case is for the prosecution to discharge their evidential burden by adducing sufficient evidence to raise a *prima facie* case against the accused. "The prosecution makes out a case against the accused by adducing evidence of primary facts." – said Lord Diplock in *Haw Tua Tau* v. *Public Prosecutor*[1]. At that stage, a trial judge should not consider whether or not a case has been proved beyond a reasonable doubt against the accused. If no evidence is called for the defence then, and then only, the tribunal of fact must decide whether the prosecution has succeeded in discharging its persuasive burden by proving its case beyond a reasonable doubt: see *Phipson* on Evidence (13th edn.) p.48 paras. 4-10.

It is with this attitude of mind that I now proceed to consider the case on the defence submission of no case to answer.

Sir James Stephen's definition

In the *Digest of the Criminal Law*, Sir James Stephen said this on seditious words (Digest, (3rd ed), Art. 91):

"A seditious intention is an intention to bring into hatred or contempt, or to excite disaffection against the person of Her Majesty, her heirs, or successors, or the government and constitution of the United Kingdom, as by law established, or either House of Parliament, or the administration of justice, or to excite Her Majesty's subjects to attempt otherwise than by lawful means the alteration of any matter in Church or State by law established, or to raise discontent or disaffection amongst Her Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of such subjects."

"Stephen J. is a judge of very great accuracy," said Cave J. in *Reg.* v. *Burns & Ors.*[2], at 360, "and for every proposition there laid down there is to be found undoubted authority. He goes on to point out what sort of intention is not seditious." Article 93 of the Digest (3rd edn.) reads:

"An intention to show that Her Majesty has been misled or

mistaken in her measures, or to point out errors or defects in the government or constitution as by law established, with a view to their reformation, or to excite Her Majesty's subjects to attempt by lawful means the alteration of any matter in Church or State by law established, or to point out, in order to their removal, matters which are producing, or have a tendency to produce, feelings of hatred and ill-will between classes of Her Majesty's subjects, is not seditious intention."

This definition of what is and what is not sedition was approved by the criminal code Commissioners* and quoted with approval by Cave J. in his summing up to the jury in *Burns*.

Stephen's definition found its way into the Criminal Code of the Gold Coast. Section 326 subsection 8 of the Criminal Code of the Gold Coast, 1936 Revision, c.9, provides:

"Sect. 326 sub-sect. 8. A 'seditious intention' is an intention –

(1) to bring into hatred or contempt or to excite disaffection against the person of His Majesty, His heirs or successors or the Government of the Gold Coast as by law established; or

(2) to bring about a change in the sovereignty of the Gold Coast; or

(3) to excite His Majesty's subjects or inhabitants of the Gold Coast to atttempt to procure the alteration, otherwise than by lawful means, of any other matter in the Gold Coast as by law established; or

(4) to bring into hatred or contempt or to excite disaffection against the administration of justice in the Gold Coast; or

(5) to raise discontent or disaffection amongst His Majesty's subjects or inhabitants of the Gold Coast; or

(6) to promote feelings of ill-will and hostility between different classes of the population of the Gold Coast:

It is not a seditious intention –

(a) to show that His Majesty has been misled or mistaken in any of his measures; or

(b) to point out errors or defects in the government or constitution of the Gold Coast as by law established or in legislation or in the administration of justice with a view to the reformation of such errors or defects; or

(c) to persuade His Majesty's subjects or inhabitants of the Gold Coast to attempt to procure by lawful means the alteration of any matter in the Gold Coast as by law established other than that referred to in paragraph (2) of this sub-section; or

(d) to point out with a view to their removal any matters which are producing or have a tendency to produce feelings of ill-will and enmity between different classes of the population of the Gold Coast.

Provided that none of the acts or things mentioned in provisos (a), (b), (c) and (d) shall be deemed to be lawful if they are done in such manner as to effect or be likely to effect any of the purposes (1) to (6) which are declared in this section to be a seditious intention.

'Seditious words' are words expressive of a seditious 'intention'."

We can see at once the unmistakable resemblance with Stephen's definition. With the exception of the proviso, which I have for the sake of clarity emphasised, subsection 8 is virtually a copy of Stephen's definition of what is and what is not sedition. As was said by Viscount Caldecote L.C. in *Wallace-Johnson* v. *The King*[3]:

"There is a close correspondence at some points between the terms of the section in the Code and the statement of the English law of sedition by Stephen J. in the Digest of Criminal Law quoted with approval by Cave J. in his summing up on *Reg.* v. *Burns & Ors.* (1886) 16 Cox C.C. 355, 359-60."

In *Wallace-Johnson* an attempt was made to attach a further qualification to the definition as stated by Stephen and which was embodied in the Criminal Code of the Gold Coast. There it was argued on behalf of the appellant that not only must the words be expressive of an intention to achieve one or more of the objects specified, they must themselves be of such a nature as to be likely to incite to violence. Counsel for the appellant referred to the following English authorities: *Reg.* v. *Sullivan*[4], *Rex* v. *Burdett*[5], where it was stated, at p.131, that to be a seditious libel it must be "calculated to incite them to acts of violence and outrage."; *Rex* v. *Aldred*[6], where Coleridge J., in summing up, said, "The word, 'sedition' in its ordinary natural signification denotes a tumult, an insurrection, a popular commotion, or an uproar; it implies violence or lawlessness in some form."

But there was no such qualification in Stephen's definition, and Stephen's definition was imported into the Criminal Code of the Gold Coast Colony.

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* "The law upon the question of what is seditious and what is not is to be found stated very clearly in a book by a learned judge, my brother Stephen, who has undoubtedly a greater knowledge of the Criminal law than any other judge who sits upon the bench, and what he has said upon the subject of sedition was submitted to the other learned judges, who some time back were engaged with him in drafting a criminal code, and upon their report the commissioners say that his statement of the law appears to them to be stated accurately as it exists at present. So that that statement has not only the authority of Stephen J., but also the authority of the very learned judges who were associated with him in preparing the criminal code." – per Cave J. in *Burns*, at p.359.

This is what Viscount Caldecote L.C., in giving the judgment of the Privy Council, said in *Wallace-Johnson*, at p.239:

"The present case, however, arose in the Gold Coast Colony, and the law applicable is contained in the Criminal Code of the Colony."

And at p.240:

"The fact remains, however, that it is the Criminal Code of the Gold Coast Colony, and not in English or Scottish cases, that the law of sedition for the Colony is to be found."

At pp.240, 241:

"Nowhere in the section is there anything to support the view that incitement to violence is a necessary ingredient of the crime of sedition. Violence may well be, and no doubt often is, the result of wild and ill-considered words, but the Code does not require proof from the words themselves of any intention to produce such a result, and their Lordships are unable to import words into [s. 326] which would be necessary to support the appellant's argument."

It is to be noted that in *Rex* v. *Aldred*, Coleridge J. (at p.4) also required language calculated to incite others to

"*public disorders*, to wit, rebellions, insurrections, assassinations, outrages, or any physical force or violence of any kind." (emphasis supplied)

Although it may appear to be the position in English case law that incitement to violence or inciting others to public disorders is an essential ingredient of sedition, it is not so in a criminal code which has as its model Stephen's definition. "In England there is no statutory definition of sedition; its meaning and content have been laid down in many decisions, ... but these decisions are not relevant when you have a statutory definition of that which is termed sedition, as we have in the present case." – said Lord Thankerton in the Privy Council case of *Emperor* v. *Sadashiv*[7].

Seditious intention

In both the Stephen and the Criminal Code of the Gold Coast definitions an intention to achieve one or more of the objects specified in the definition is an essential ingredient of the crime of sedition. The important question is whether the "intention" must be proved. In article 94 of the Digest (4th edn.) Stephen put it thus:

"In determining whether the intention with which any words were spoken, any document was published, or any agreement was made, was or was not seditious, every person must be deemed to intend the consequences which would naturally follow from his conduct at the time and under the circumstances in which he so conducted himself."

Stephen's view did not require any more *mens rea* than an intention to publish the words which were published. It would not be necessary to prove an actual intention to achieve any one of the objects specified.

In *Wallace-Johnson* v. *The King*, counsel for the appellant (at p.234)

"contended (a) that both in English common law and in the Criminal Code in question there must be some evidence of intention outside the mere words of the instrument before a seditious intention can be said to exist; and (b) that in the present case, when the document is read, there cannot be found in it any seditious intention at all; and therefore before the appellant can be convicted there must be some evidence of seditious intention extrinsically, and, there being none, this conviction cannot stand on any ground."

The Lord Chancellor in giving the judgment of the Privy Council said, at p.240:

" 'Seditious words,' in the terms of sub-section 8, 'are words expressive of a seditious intention'. By an earlier definition in the same sub-section, 'A seditious intention' is an intention to bring into hatred or contempt ... the Government of the Gold Coast as by law established."

He went on to say, at p.241:

"The submission that there must be some extrinsic evidence of intention, outside the words themselves, before seditious intention can exist, must ... fail ... If the words are seditious by reason of their expression of a seditious intention as defined in the section, the seditious intention appears without any extrinsic evidence. The Legislature of the Colony might have defined 'seditious words' by reference to an intention proved by evidence of other words or overt acts. It is sufficient to say they have not done so."

Put in another way (and for this I cannot do better than to adopt the words in the *headnote*, at p.231) – If the words complained of are themselves "expressive of a seditious intention" as defined in the section they are "seditious words". It is not necessary to produce any extrinsic evidence of intention, outside the words themselves, before seditious intention can exist. If the words are seditious by reason of their expression of a seditious intention as defined in the section the seditious intention appears without any extrinsic evidence.

The Sedition Act 1948

I have shown that the model for sub-section 8 of section 326 of the Criminal Code of the Gold Coast was Stephen's definition of sedition in Article 93 of the *Digest*. In *Wallace-Johnson* the Privy

Council has laid down that incitement to violence is not a necessary ingredient of the crime of sedition under the Criminal Code of the Gold Coast. *A fortiori*, inciting others to public disorders is not a necessary ingredient of sedition.

In Stephen's definition and as well as the Criminal Code of the Gold Coast, a seditious intention is an essential ingredient, but Stephen in Article 94 of the *Digest* had expressed the view that intention is no more than the natural consequence of the words, and the Privy Council in *Wallace-Johnson* has held that it is not necessary to prove actual intention. It is enough if the words are seditious by reason of their expression of a seditious intention as defined in the section.

It looks as if it was with hindsight that the Sedition Act 1948 came to be drafted. If intention requires no more *mens rea* than an intention to publish the words which were published, if it is not necessary to prove actual intention because seditious words are words which are "expressive of a seditious intention" as defined in the section, then the gravamen or an essential ingredient of sedition is not *mens rea* (intention) but an *actus reus*. That is, the words must have a tendency (a seditious tendency) to achieve one or more of the objects specified.

Therefore instead of beginning with the words "A seditious intention is an intention", our section 3(1) starts off with:

"3.(1) *A 'seditious tendency' is a tendency* – (emphasis supplied)

(a) to bring into hatred or contempt or to excite disaffection against any Ruler or against any Government;

(b) to excite the subjects of any Ruler or the inhabitants of any territory governed by any Government to attempt to procure in the the territory of the Ruler or governed by the Government, the alteration, otherwise than by lawful means, of any matter as by law established;

(c) to bring into hatred or contempt or to excite disaffection against the administration of justice in Malaysia or in any State;

(d) to raise discontent or disaffection amongst subjects of the Yang di-Pertuan Agong or of the Ruler of any State or amongst the inhabitants of Malaysia or of any State; or

(e) to promote feelings of ill-will and hostility between different races or classes of the population of Malaysia; or

(f) to question any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III of the Federal Constitution or Article 152, 153 or 181 of the Federal Constitution.

(2) Notwithstanding anything in sub-section (1) an act, speech, words, publication or other thing shall not be deemed to be seditious by reason only that it has a tendency –

(a) to show that any Ruler has been misled or mistaken in any of his measures;

(b) to point our errors or defects in any Government or constitution as by law established **(except in respect of any matter, right, status, position, privilege, sovereignty or prerogative referred to in paragraph (f) of sub-section (1) otherwise than in relation to the implementation of any provision relating thereto)** or in legislation or in the administration of justice with a view to the remedying of the errors or defects;

(c) **except in respect of any matter, right, status, position, privilege, sovereignty or prerogative referred to in paragraph (f) of sub-section (1)** –

(i) to persuade the subjects of any Rulers or the inhabitants of any territory governed by any Government to attempt to procure by lawful means the alteration of any matter in the territory of such Government as by law established; or

(ii) to point out, with a view to their removal, any matters producing or having a tendency to produce feelings of ill-will and enmity between different races or classes of the population of the Federation

if the act, speech, words, publication or other thing has not otherwise in fact a seditious tendency.

(3) For the purpose of proving the commission of any offence against this Act the intention of the person charged at the time he did or attempted to do or made any preparation to do or conspired with any person to do any act or uttered any seditious words or printed, published, sold, offered for sale, distributed, reproduced or imported any publication or did any other thing shall be deemed to be irrelevant if in fact the act had, or would, if done, have had, or the words, publication or thing had a seditious tendency.

The portions which I have highlighted in bold type did not appear in the original form of the section.†

Seditious tendency

Although it is unnecessary to prove "intention": see section 3(3) of the Act, it is necessary to prove that the words have a tendency to achieve one or more of the objects specified in section 3(1) of the Act. In deciding whether the words have this tendency, it is proper (to borrow the words of Coleridge J. in *Rex* v. *Aldred* at p. 3).

"... to look at all the circumstances surrounding the publi-

† For an outline of the history of the new provisions, see *per* Ong C.J. in *Melan* v. *Public Prosecutor*[8].

cation with the view of seeing whether the language used is calculated to produce the results imputed; that is to say, you are entitled to look at the audience addressed, because language which would be innocuous, practically speaking, if used to an assembly of professors or divines, might produce a different result if used before an excited audience of young and uneducated men."

On the other hand (to use the language of Cave J. in *Reg.* v. *Burns*):

"A man cannot escape from the consequences of uttering words with [a seditious tendency] solely because the persons to whom they are addressed may be too wise or too temperate to be seduced [by those words]."

Therefore words are seditious (1) if they are likely to incite or influence the audience actually addressed or (2) if they are likely to incite or influence ordinary people even though the audience addressed was unaffected by the words.

What is not seditious

Stephen in Article 93 of the *Digest* gave the definition of what is not seditious. Almost identical provisions are to be found in the Criminal Code of the Gold Coast. With regard to the Gold Coast provision, this is what the Privy Council said in *Wallace-Johnson*, at p.240.

"Questions will necessarily arise in every case, as in this case, as to the facts to which it is sought to apply these definitions. Fine distinctions may have to be drawn between facts which justify the conclusion that the intention of the person charged was to 'bring into hatred or contempt ... the Government of the Gold Coast,' and facts which are consistent only with the view that the intention was no more than, in the words of a later part of sub-section 8, 'to point out errors or defects in the Government ... of the Gold Coast.' "

In our Sedition Act, we have section 3(2). The subsection specifies the circumstances or situations which are not seditious. Fine distinctions may have to be drawn between facts which justify the conclusion that there was a tendency to achieve one or more of the objects specified in section 3(1), and facts which are consistent only with the view that the tendency was no more than to do the acts or things mentioned in section 3(2). Provided that in doing any of the acts or things mentioned in section 3(2), the words used do not have the effect of achieving any of the objects specified in section 3(1).

There is a similar provision to our section 3(2) in the Criminal Code of the Gold Coast: see the proviso to subsection 8 of section 326 of the Gold Coast Code.

Freedom of speech

Of course we must not overlook the importance of freedom of speech. The relevant parts of Article 10 of the Federal Constitution reads:

"10. (1) Subject to Clauses (2), (3) and (4) –

(a) every citizen has the right to freedom of speech and expression;

(2) Parliament may by law impose –

(a) on the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence;

(4) In imposing restrictions in the interest of security of the Federation or any part thereof or public order under Clause (2) (a), Parliament may pass law prohibiting the questioning of any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III, Article 152, 153 or 181 otherwise than in relation to the implementation thereof as may be specified in such law."

From the above provision, it is clear that subject to Clauses (2) and (4) of article 10, every citizen has the right to freedom of speech and expression. For the purposes of the present case only the following part of Clause (2) (a) is relevant, which is that Parliament may impose such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof or public order. By virtue of Article 4(2) (b) the validity of any law which Parliament under Article 10(2)(a) has deemed necessary or expedient to pass to impose restrictions on freedom of speech shall not be questioned.

Although the Sedition Act 1948 came into force before Merdeka Day, under article 162(1) it continues to be still in force: see *Assa Singh* v. *Mentri Besar, Johore*[9].

Raja Abdul Aziz has argued that inciting others to public disorders is an essential ingredient of the crime because of the words "in the interest of ... public order" in article 10(2) (a) of the Constitution. Public disorders may well be, and no doubt often is, the result of wild and ill-considered words, but there is no requirement in the constitutional provision that the law made under it must be aimed at an intention to produce that result. As here, section 3(1) of the Sedition Act does not

require proof from the words themselves of any intention to produce such a result. Those words which would be necessary to support the argument of the defence need not be imported into section 3(1) of the Sedition Act.

Prima facie case

I am satisfied that the prosecution has, in the present case, discharged their evidential burden by adducing evidence of primary facts. At this point, I keep an open mind about various aspects of the case, in particular, with regard to whether or not a seditious tendency has been proved, and whether the words were in fact published in the spirit of the matters referred to in section 3(2) of the Act in that those words by themselves did not bear a seditious tendency. It is my duty at this stage to suspend judgment on them until all the evidence that either party wished to put before the court had been presented and counsel on both sides have addressed to me such arguments and comments on the evidence as they may wish to advance. Then only would I direct my mind to the question whether the guilt of the accused had been proved beyond reasonable doubt.

I therefore call upon Mr. Cumaraswamy to enter on his defence.

Order accordingly.

Solicitors: *Shook Lin & Bok.*

PUBLIC PROSECUTOR v. PARAM CUMARASWAMY (NO. 2)

[O.C.J. (Chan J.) January 25, 1986]

[Kuala Lumpur – Federal Territory Criminal Trial No. 39 of 1985]

Criminal Law and Procedure – Charge of sedition – Freedom under the law – Free speech and the constitutional provisions – Free speech and sedition – Sedition Act, 1948, ss. 3 & 4.

In this case the accused was charged with uttering seditious words, an offence under the Sedition Act, 1948. He was called for his defence (see [1986] 1 M.L.J. 512.) The accused made his defence. He said that in his open appeal he was urging the Pardons Board to exercise their powers fairly and uniformly so that people would not be made to feel that the Board were discriminating.

Held: (1) the words which were used to point out to the Pardons Board that the people should not be made to feel that the Board was discriminating between Mokhtar Hashim and Sim Kie Chon were not words which were likely to create discontent or disaffection among the people. Further it could not said that the statement was likely to create discontent among the people against Authority;

(2) taking all the circumstances into consideration the statement did not have a tendency to promote ill-will and hostility between the different classes of the population;

(3) the appeal was directed at the Pardons Board not at the Ruler, in this case, the Yang di-Pertuan Agong. Therefore there can be no question of the statement having a tendency to bring into hatred or contempt or to excite disaffection against the Yang di-Pertuan Agong.

Cases referred to:

(1) *Kedar Nath* v. *State of Bihar* A.I.R. 1962 S.C. 955.
(2) *Ramji Lal Modi* v. *State of U.P.* [1957] S.C.R. 860; A.I.R. 1957 S.C. 620. 622.
(3) *R.* v. *Collins* (1839) 3 St. Tr. (N.S.) 1149.
(4) *R.* v. *Lovett* (1839) 3 St. Tr. (N.S.) 1177.
(5) *R.* v. *Jones* (1848) 6 St. Tr. (N.S.) 783.
(6) *R.* v. *Aldred* (1909) 22 Cox. C.C.1.
(7) *R.* v. *Burdett* (1820) 1 Sc. Tr. (N.S.)1.
(8) *R.* v. *Caunt* (1947) 64 L.Q.R. 203.
(9) *Wallace-Johnson* v. *King* [1940] A.C. 231.
(10) *R.* v. *Sullivan* (1868) 11 Cox C.C. 44, 50.
(11) *R.* v. *John Miller* (1770) 20 St. Trials 869.
(12) *Burns* v. *Ransley* (1949) 79 C.L.R. 101.
(13) *Reg.* v. *Burns* (1886) 16 Cox C.C. 355.
(14) *Maru Ram* v. *Union of India* A.I.R. 1980 S.C. 2147.
(15) *Tonkin* v. *Brand* (1960) W.A. Rep. 535.
(16) *FAI Insurance Ltd.* v. *Winneke* [1982] A.L.J.R. 388.
(17) *Teh Cheng Poh* v. *Public Prosecutor* [1979] 1 M.L.J. 50.
(18) *O.S.K.* v. *Tengku Noone* [1983] 1 M.L.J. 179.

CRIMINAL TRIAL.

Mohamed Nor bin Hj Ahmad and *Ng Aik Guan* for the Public Prosecutor.

Raja Abdul Aziz Addruse, C.V Das, P. Royan, Manjeet Singh Dhillon and *Darryl Goon* for the defendant.

S. Theivanthiran for the Malayan Bar (watching brief).

R.R. Chelliah for the International Bar Association (watching brief).

Datuk Peter Mooney for the Bar Council of England and Wales (watching brief).

G.T.S. Sidhu for LAWASIA (watching brief).

Dato Wong Seng Chow for the *New Straits Times* (watching brief).